

GBLJTUZY

Conference

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

S7 15 Cr. 536 PGG

5 OMAR AMANAT and
6 KALEIL ISAZA TUZMAN,

7 Defendants.

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10 November 21, 2016
11 12:36 p.m.

13 Before:

14 HON. PAUL G. GARDEPHE,

15 District Judge

17 APPEARANCES

19 PREET BHARARA,
20 United States Attorney for the
21 Southern District of New York
22 ANDREA MICHELLE GRISWOLD,
23 A. DAMIAN WILLIAMS,
24 Assistant United States Attorneys
25

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(APPEARANCES Continued)

CREIZMAN, PLLC,
Attorneys for defendant Amanat
BY: ERIC M. CREIZMAN, Esq.
CAROLINE POLIZI, Esq.
Of counsel

BEYS, STEIN & MOBARGHA, LLP,
Attorneys for defendant Tuzman
BY: MICHAEL PETROS BEYS, Esq.
- and -
GIBSON, DUNN & CRUTCHER, LLP (NY)
BY: AVI WEITZMAN, Esq.
Of counsel

Also Present:
DANIEL SANFORD, Special Agent FBI
MELISSA ATLEIN, Inspector, U.S. Postal Service

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1 (In open court)

2 (Case called)

3 THE COURT: Okay. Ms. Griswold or Mr. Williams, bring
4 me up to speed on discovery. I gather there has been some
5 additional material provided recently, but what is the current
6 status of discovery?

7 MS. GRISWOLD: Certainly, your Honor. Since we were
8 last here on September 22, we have unsealed charges against
9 cooperator Gavon Champion. We expect that there will be a
10 modest amount of additional discovery to be produced in
11 connection with those charges. Specifically, Mr. Champion,
12 through counsel, produced certain documents to the government.

13 These are largely corporate documents such as e-mails
14 and documents Mr. Champion sent and received while at Kitt
15 Digital. Most of these materials are duplicative of what is
16 already produced. We do intend to produce a complete set of
17 Champion materials within the next week or two. I will
18 describe the volume of those as modest, a couple of binders
19 worth of documents.

20 Since we also were here on September 22nd at the last
21 conference, you recall there was discussion about the level of
22 overlap between the documents produced to Mr. Tuzman in the
23 civil case and those produced in the criminal case, and the
24 court asked the parties to work on resolving those issues.

25 At the time the government didn't have all of the

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1 documents that were produced to Mr. Tuzman in the SEC case, but
2 recognizing that this is a unique case where one defendant,
3 Mr. Tuzman, had documents that the other other defendant didn't
4 have, we decided to obtain the SEC's entire production and
5 produce it to Mr. Amanat. We expect to have that today, and
6 once we have it and copy it, we will promptly produce it to
7 Mr. Amanat.

8 Turning to the Maiden discovery, the government has
9 produced since the last conference images of two computers that
10 were voluntarily provided by Mr. Maiden, another cooperator in
11 this case, to the FBI in the Western District of North Carolina
12 in or about the summer of 2013. One is a desktop and one is a
13 laptop. We produced those images on November 16th.

14 We have extracted the non-email documents from the
15 images and created a load file that makes them searchable and
16 have offered to produce that to defense counsel. I would note,
17 just to give a sense of volume and context, that there are
18 approximately 11,000 documents in total on the two devices.
19 Those are the non-email documents, and just to put that in
20 context, I believe there are about two million pages was the
21 reference defense counsel gave in terms of the discovery that
22 has already been produced to date. I believe that is several
23 hundred thousand documents.

24 In addition to the com-portance load file that we have
25 offered to produce for the non-email documents, we have also

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1 extracted five PSD files containing the e-mails on Mr. Maiden's
2 computer and will have also offered to produce those so that
3 they can be searched.

4 In addition to that, we have continued to investigate
5 the case, obviously, and to that end we do expect to produce
6 some additional e-mails from an e-mail account within the next
7 couple of weeks. We don't anticipate any motion practice from
8 these e-mails. We don't expect to produce any e-mails from
9 accounts controlled by the two defendants, and because of
10 ongoing law enforcement issues, we are not able to indicate any
11 more detail, but we can, of course, provide the court more
12 information about those e-mails if you would like.

13 That is the status of the discovery in this case.

14 THE COURT: In light of what has taken place, in light
15 of the statements that Ms. Griswold has made this morning, are
16 there remaining discovery issues that the lawyers want to
17 raise, the defense lawyers?

18 I have a motion to compel before me, so obviously I
19 want to know whether what Ms. Griswold has said moots out that
20 motion either in whole or in part.

21 MR. BEYS: Your Honor, if I may, I would like to
22 address the big picture, and then I will ask Mr. Weitzman to
23 speak specifically to the motion to compel.

24 What we just heard from Ms. Griswold is eerily
25 familiar. We heard on September 22 that discovery was

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1 substantially complete and, in fact, once we brought a motion
2 to compel, it turned out that there was much voluminous
3 additional discovery. Now, the 11,000 documents that she is
4 referring --

5 THE COURT: I would like to focus on what remains in
6 dispute with respect to the motion to compel. If you could
7 address that or have Mr. Weitzman address that, I would
8 appreciate it.

9 MR. BEYS: The short answer is I don't think we know
10 yet.

11 THE COURT: That is an answer. If you don't know yet,
12 that is an answer. I have a motion in front of me, a
13 representation made by the government, and I want to know is
14 the motion still in dispute or is it not?

15 MR. WEITZMAN: Your Honor, the motion is still in
16 dispute. I am happy to address why it is still in dispute. We
17 don't believe it has been mooted, on multiple grounds. There
18 are some grounds that have been mooted and some that have not.
19 We can do it either today orally, or we can put it in a reply
20 submission if your Honor would prefer.

21 THE COURT: If it is complicated, it would be best to
22 have it done in writing.

23 MR. WEITZMAN: We are happy to do that.

24 MR. CREIZMAN: Ours is largely mooted, I think, except
25 for one aspect which we raised that the government mentioned

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1 the SEC had in its possession a portfolio that belonged to Mr.
2 Maiden. We requested that we obtain access to any Skype
3 messages, computer telephone calls that may have occurred that
4 are on Mr. Maiden's computer. I am not sure whether the
5 government or the SEC has looked into that, but that would be
6 our principal issue.

7 THE COURT: Okay. Both with respect to Tuzman and
8 Amanat, if you could send me a letter, say, a week from today
9 telling me what remains in dispute, and then the government can
10 respond to that letter, then I'll have an understanding of what
11 remains in the motion to compel.

12 Mr. Beys, is there anything else you want to say about
13 discovery before I turn to other matters?

14 MR. BEYS: Regarding discovery specifically, your
15 Honor, no. The motion to compel. Ms. Griswold mentioned the
16 additional discovery on November 16th. We only got a hard
17 drive on Friday, so we're still reviewing that.

18 No, that is all for now.

19 THE COURT: Okay. The lawyers, defense counsel, have
20 told me they wish to make a number of motions, including a
21 motion to dismiss, also a motion for severance. There may be
22 additional motions with respect to discovery, I don't know, but
23 I am going to set a schedule for all defense motions. All
24 defense motions will be due on January 31st. The government
25 will respond by February 21st. Any reply will be due on

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1 February 28th.

2 There is an issue I wanted to raise about this
3 privilege question about the Maiden documents. The government
4 has sent me a letter, dated November 17th. It is Docket No.
5 171, and they say that this issue about privilege is actually
6 in front of Judge Nathan, who has the SEC civil enforcement
7 action against Mr. Tuzman, and the government says that any
8 issues about privilege should be addressed by her.

9 I am going to want the defense counsel to respond to
10 the government's letter and essentially tell me why I should
11 get involved in this if it remains a live issue, and I might
12 say it is not clear to me what remains live based on what has
13 been turned over and what has been promised to be turned over.

14 Assuming there are live issues that remain about the
15 Maiden production other than the Skype point that has been
16 made, assuming there are, and assuming there are privilege
17 issues that are live, the government says well, these are
18 essentially in front of Judge Nathan so I shouldn't get
19 involved in that. You can either address it now or you are
20 welcome to send me a letter, but I need so response to that.

21 MR. WEITZMAN: The privilege issue is not moot.

22 What has happened here is that after several months
23 when Mr. Maiden's counsel and the SEC has taken the position
24 that these two documents which we received were privileged, now
25 in the face of a waiver of privilege, which can be much broader

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1 than than just the two documents, Mr. Maiden has taken the
2 position that for the first time these documents were never
3 privileged even though they say, "attorney-client privileged"
4 on them and he represented in a letter they were prepared at
5 the request of counsel. I won't call names, but we know what
6 that is. He is trying to avoid a privilege waiver, a privilege
7 waiver that is indefensible as a result of the 2000 wholesale
8 production of two computers to the FBI.

9 THE COURT: When did that happen?

10 MR. WEITZMAN: In 2013. And then in 2014 he produces
11 I don't know if it is the same two computers or maybe a later
12 version, the same two computers with additional documents to
13 the SEC, and he attempts failingly to preserve some privilege.

14 The issue that is before your Honor and not before
15 Judge Nathan will be the scope of that privilege waiver. There
16 is an absolute waiver here. We plan, I will tell --

17 THE COURT: Why is that not before her?

18 MR. WEITZMAN: There are no discovery, no subpoenas
19 outstanding in the SEC case.

20 THE COURT: I thought document discovery was ongoing
21 in that case. Am I mistaken?

22 MR. WEITZMAN: No. You are correct. We issued no
23 subpoenas in that case. We plan to issue and request your
24 Honor to grant a subpoena to be issued to Mr. Maiden's counsel.
25 The privilege waiver is so absolute that the issue needs to be

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1 cited here. There is exculpatory evidence that we have
2 identified just in two documents and we plan to litigate in
3 this courtroom the scope of that waiver.

4 THE COURT: I will hear from the government.

5 MS. GRISWOLD: Your Honor, the question is whether
6 there are documents on the SEC version of the Maiden computers
7 that are not on the FBI version, and if there are, those are
8 documents that have only been produced in the case before Judge
9 Nathan.

10 So from the government's perspective, the idea that
11 that should be brought in the criminal case before your Honor
12 to decide what the status is of those documents, and if there
13 was a waiver as to those documents, if that creates a broader
14 global waiver, should clearly go before Judge Nathan.

15 THE COURT: What do you say in response to Mr.
16 Weitzman's point?

17 He says that the issue is not ripe in front of Judge
18 Nathan. That is my sense of it.

19 MS. GRISWOLD: I am not sure I understand the point.

20 Discovery is ongoing in the case before Judge Nathan
21 just as it is ongoing before your Honor. There is litigation
22 going on in the civil case before Judge Nathan. In fact, I
23 believe there is a pending motion to dismiss the complaint in
24 that case. So I don't think it's raised any more
25 appropriately -- in fact, less appropriately before your Honor

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1 than before Judge Nathan. Again those documents have only been
2 produced in the SEC case pending before her.

3 MR. WEITZMAN: I am not sure why the government is
4 preferring to litigate this before Judge Nathan, but it seems
5 very clear to me that we have filed a motion that says this is
6 a joint investigation, the FBI and U.S. Attorney's Office and
7 SEC.

8 The U.S. Attorney's Office is obligated to take all
9 the documents in the possession of the SEC and produce them
10 under Rule 16, Brady and Giglio. The government responded and
11 relegated that response to a single footnote in which they
12 attempted to distinguish Martoma. I suspect they're trying to
13 avoid your Honor's ruling in Martoma and the critical review
14 your Honor gave to whether there is a joint investigation here.
15 That is still a live issue that was entirely avoided by the
16 government's response.

17 MS. GRISWOLD: Your Honor, respectfully, if the
18 documents are not in the possession of the SEC properly, then
19 the whole Martoma issue, if you will, in terms of what the
20 government's obligations are or are not, whether or not the
21 government has an obligation to look into those files, you
22 don't reach that until the threshold question is answered,
23 namely, whether or not those documents that have to date been
24 produced only in the SEC action are properly in the custody and
25 control of the SEC.

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1 Without taking that up in front of Judge Nathan in the
2 first instance, we don't see how any questions that might flow
3 from that could be resolved.

4 MR. WEITZMAN: Just one more point, and I apologize
5 for the delay. We served our motion on the SEC and on Mr.
6 Maiden. Mr. Maiden responded with a two-page letter that for
7 the first time contradicted his prior admission these are
8 privileged documents, and reserves and asks for an opportunity
9 to respond which I think frankly is waived. He had an
10 opportunity to respond. The SEC didn't even attempt to
11 intervene or respond to preserve its rights. The government
12 hasn't even raised this issue until now for the first time.

13 I don't think the government's proper position here
14 should be to lob a six-page letter saying everything is moot,
15 nothing to see here when we filed very serious motions that
16 suggest there is a joint investigation and the government has
17 not complied with its discovery obligations.

18 Frankly, in light of the fact they produced 500
19 gigabyte, two 550 gigabyte hard drives that contain two
20 computers that the FBI have had for three years and the U.S.
21 Attorney's Office apparently never received them prior, it begs
22 the question of what else has the U.S. Attorney's not sought
23 within its possession.

24 The FBI and Postal Inspection is here. I think we
25 need to make sure that they've collected all the documents in

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1 the FBI and Postal Service's possession and produce them and
2 review them for Brady and Giglio. There are live issues that
3 remain. The SEC hasn't intervened to raise this issue that Ms.
4 Griswold is raising for the first time and Mr. Maiden has
5 waived any further response.

6 THE COURT: Do you know what the difference is between
7 what you referred to as the FBI images of the Maiden computers
8 and the SEC images?

9 MR. WEITZMAN: You're asking me?

10 THE COURT: I am asking the government.

11 MS. GRISWOLD: What we do know is that between
12 approximately the summer of 2013 when the computers were imaged
13 and given to the FBI and the time that they were imaged by the
14 SEC in November of 2014, to the extent that there were
15 privileged documents or other documents added to the computers
16 during that time period, those are likely to be on the images
17 that the SEC has and not on the images that the FBI has that
18 were produced in the criminal case. Beyond that, the SEC is
19 currently undertaking a forensic analysis to compare. They now
20 have the FBI versions so that they can tell us with more
21 precision what is on those documents.

22 What is on the SEC computers, not on the FBI ones, I
23 would note the time period of the charged allegations and the
24 conduct here with respect to Mr. Maiden I think highlighted by
25 the two documents at issue, raised in Mr. Tuzman's motion, a

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1 lot of that conduct, the bulk of that conduct was completed
2 prior to the time that the computers were imaged by the FBI.
3 That would suggest to us that at least we know for a fact those
4 two documents are on the FBI images and give some suggestion
5 what may be on the SEC version, but not on the FBI. We won't
6 know until the forensic analysis is completed.

7 THE COURT: What is the time period of the charged
8 conspiracy? What is the time period in the indictment?

9 MS. GRISWOLD: There are multiple charges, as you
10 pointed out. The most relevant charge would be the market
11 manipulation conspiracy, which is Count 4 in the current S7
12 indictment, and that is between in or about December of 2008
13 and in or about September of 2011.

14 So your Honor is making the point that I was trying to
15 make which is that by that end date of September 2011, the
16 computers were imaged in 2013.

17 THE COURT: It seems somewhat dubious, Mr. Weitzman,
18 there will be a lot of relevant stuff years after the period of
19 the charged conspiracy.

20 MR. WEITZMAN: Is disagree, your Honor.

21 The two documents we firmly believe are exculpatory
22 that postdate the date of the conspiracy are work product that
23 Mr. Maiden created at counsel's request to summarize his
24 allegations about my client. Those documents, for example, not
25 one of them mentions that my client ever provided a single

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1 instruction in coded language, text message or e-mail that
2 caused Mr. Maiden to buy Kitt Digital stock. This is a 15 or
3 20 page, single-spaced dissertation of everything he knows
4 about my client, and all of a sudden those allegations
5 disappear. Not one --

6 THE COURT: All right. I have heard enough.

7 MR. WEITZMAN: His correspondence with counsel is very
8 important and potentially exculpatory.

9 THE COURT: I understand. I understand.

10 It was my hope that, first of all, it sounded like so
11 much of the Maiden materials have already been turned over. I
12 came down thinking the issue was largely mooted. The
13 government also said the issue was largely mooted. I hear from
14 defense counsel it is not really moot.

15 If the parties are intent on litigating this issue, it
16 is a complicated one and I am going to require, going to need a
17 formal response from the government. A letter is not going to
18 do it. I am going to need affidavits laying out or addressing
19 the issue of whether this was a joint investigation or wasn't a
20 joint investigation. I am going to need formal briefing.

21 My general understanding that I shared with you
22 sometime ago, probably in September, was that a wholesale
23 production by Mr. Maiden of his documents and electronically
24 stored information would ordinarily constitute a full waiver of
25 any attorney-client privilege. I have read some things in the

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1 correspondence or some of the other documents I have been given
2 which suggest there may have been some agreement between the
3 SEC and Mr. Maiden's counsel about protecting the
4 confidentiality of the documents.

5 Those types of agreements are looked at with a
6 somewhat jaundiced eye by most circuits. The leading case in
7 this circuit, as far as I know, unless there has been more
8 recently authority is the Steinhart case. Steinhart suggests
9 that there may be an exception where the government agency has
10 received documents pursuant to some sort of agreement to
11 protect them.

12 As I said, that view has been largely rejected almost
13 uniformly by every other circuit in the United States.
14 However, if there is no more recent authority than Steinhart in
15 the Second Circuit, it may actually present an issue, a
16 significant issue. I say this just to say that if the parties
17 can't reach some agreement about how the Maiden materials are
18 going to be handled, and part of the frustration is here I am
19 not really clear on what remains in dispute, and the FBI
20 computer images have to be compared to the SEC computer images,
21 so I don't even know what the difference is going to be or
22 whether it is going to be significant.

23 If there are differences between what was secured by
24 the FBI and what was later obtained by the SEC, and if
25 privilege is being asserted by Mr. Maiden as to those

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1 additional materials that are on the SEC images but not on the
2 FBI images, then it will raise a significant issue. Obviously,
3 I will give Mr. Maiden's counsel an opportunity to address the
4 matter as well.

5 So, Ms. Griswold, do you have a sense of when it is
6 going to be resolved, what the difference is between the SEC
7 images and the FBI images?

8 MS. GRISWOLD: Your Honor, we are hopeful, given the
9 volume of materials, it will be a matter of weeks, but we don't
10 know because we haven't heard definitively.

11 What I would propose is as soon as we do know, the
12 government can update the court and the parties as to either
13 the timing in the first instance and then what the results of
14 the forensic comparisons show so we have more guidance as to
15 how the court would like to move forward.

16 THE COURT: What do you say, Mr. Weitzman?

17 It seems like it is a moving target until we actually
18 know what the difference is, we're dealing with sort of an
19 amorphous, abstract issue. What do you say?

20 MR. WEITZMAN: I agree with you, your Honor, to some
21 extent. My concern is that we have a January deadline for all
22 defense motions. If those are motions that go to the
23 indictment or severance, I'd understand. If I understood your
24 Honor correctly, it is all discovery motions. I think that
25 that type of moving target with motion practice as well makes

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1 it very difficult for us to comply with that January deadline.
2 If we can limit that deadline, I think I am amenable to it.
3 There is one question I have, though, in addition which is that
4 we do plan to present subpoenas that we think are warranted as
5 a result of the discussion here.

6 Will your Honor accept those by letter or by motion on
7 an ex-parte basis?

8 THE COURT: Yes. Yes, and you can send them with a
9 letter. It doesn't need to be a formal motion.

10 MR. WEITZMAN: Thank your Honor.

11 THE COURT: Well, I am not going to limit the dates.
12 My hope is that -- I am not going to limit the nature of the
13 motions that have to be filed on January 31st. My hope is
14 that -- and, Ms. Griswold, I want you to make this happen -- I
15 want you to tell the SEC we need rapid action on this computer
16 comparison that we have been talking about because I don't want
17 that to delay the proceedings here.

18 Absent this problem of knowing what is actually in
19 dispute, I would want briefing now on the Maiden issue and I
20 would want affidavits setting out what the nature of the
21 investigation was and whether it was joint or whether it was
22 not joint, and all of that. I can't do that because I don't
23 really know what is in dispute yet.

24 So we're being held hostage really to that issue, and
25 I don't want to disturb the motion schedule I've set up because

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1 we don't have clarity on that. I'll have to if we don't have
2 clarity on it in enough time for defense counsel to adequately
3 brief the issue, and Maiden's counsel as well.

4 So, Mr. Weitzman, something else you want to say?

5 MR. WEITZMAN: Yes, your Honor. I apologize.

6 I think I misunderstood your Honor's question to me.
7 As to the overlap between the 2013 production which was a
8 wholesale production and the 2014 which attempted to preserve,
9 I agree that we need to resolve whether there is overlap and
10 how absolute that is.

11 As to the joint investigation issue, that is an
12 entirely separate issue that should proceed now in order to
13 permit us to file motions by January. The joint investigation,
14 I have not heard a representation that, other than the Maiden
15 documents, the government has everything the SEC has. That is
16 not a representation anybody has ever made to the court or to
17 us, so there is still an obligation, in our view, for the U.S.
18 Attorney's Office to take possession of the SEC's files. I
19 think we should proceed on that issue.

20 On the issue of the waiver and how absolute the waiver
21 is, that also doesn't require an understanding of the overlap
22 because the waiver is necessitated by the 2013 production. All
23 the facts necessary to understand the waiver can proceed now.

24 THE COURT: Let's start with the first point. I
25 guess -- well, let me start with the second point you made.

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1 If it turns out that there is -- maybe there won't be
2 entire overlap, but if there was entire overlap, wouldn't it be
3 wasteful to engage in briefing on the subject?

4 MR. WEITZMAN: No, because our position is the fact
5 the computers were turned over doesn't end the inquiry of what
6 additional documents Maiden and his counsel have that would be
7 responsive and need to be turned over. That is why I want to
8 present a subpoena to your Honor. That litigation is going to
9 proceed whether on this track or I think a separate track
10 because once we serve that subpoena, I am sure they will move
11 to quash.

12 THE COURT: I thought you were agreeable to the idea
13 we needed to figure out what was the difference between what
14 was on the FBI images and what was on the SEC images? I
15 thought you agreed with that, but now what you're saying to me
16 suggests you actually don't agree with that?

17 MR. WEITZMAN: As I thought about it some more, I
18 think it does address an issue that is in play, but isn't an
19 outcome-determinative issue as to several of the questions that
20 remain pending before your Honor.

21 THE COURT: What does the government say?

22 MS. GRISWOLD: We think that additional information is
23 very important. It may be if there is no difference between
24 the two computers, that there really is no issue. As I
25 represented before, the government has undertaken and expects

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1 to receive today the entirety of the SEC's document production
2 in this case, so we do believe that having more information
3 will certainly guide what future practice, if any, needs to
4 take place, and we hear your Honor about the need for rapid
5 comparison and will replay that promptly to the SEC. We think
6 the far more logical path forward is to see what that
7 comparison shows and go from there.

8 THE COURT: So it sounds like with respect to Mr.
9 Weitzman's point, he has never gotten a representation that the
10 U.S. Attorney's Office has everything that the SEC has. It
11 sounds like you're going to be prepared to make that
12 representation soon?

13 MS. GRISWOLD: Your Honor, certainly with respect to
14 documents, yes. We have not evaluated beyond that, but
15 certainly with respect to documents, yes.

16 MR. WEITZMAN: They can't represent they have
17 everything the SEC has. They can only represent that they have
18 everything that the SEC produced. The SEC may have in its
19 possession other files that were never produced in response to
20 a different action.

21 So the SEC never represented to us that we have every
22 single document that the SEC has in its possession that may
23 potentially be relevant, responsive, Rule 16, Brady, Giglio for
24 the criminal case. In fact, they objected to many of the
25 requests for production that we made. I assume the SEC has

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1 voluminous additional records that it has not produced and that
2 the government either has, has not obtained or will soon
3 obtain, but it is unclear to me what they're getting:

4 THE COURT: All right. It sounds like I am going to
5 need a formal response to defendants' motion to compel Ms.
6 Griswold. How long do you want to take to do that?

7 And again the response will have to include affidavits
8 discussing the nature of the investigation that was conducted
9 by the SEC and the U.S. Attorney's Office whether those
10 investigations were joint or separate, et cetera.

11 MS. GRISWOLD: Well, your Honor, I am sorry. I was
12 just consulting with Mr. Williams because we are not sure how
13 long this comparison will take. I guess we would request a
14 month at this point.

15 THE COURT: All right. Well, today is the 21st of
16 November, so that would bring us to December 21st. I would
17 hope by that time the computer comparison would have been done
18 because I would like to resolve the discovery issues well
19 before January 31 if that is possible, at least the known
20 discovery issues. There may be others than the ones that have
21 been raised to date.

22 After the government files its response, the defense
23 counsel, if they feel they need an opportunity to put in a
24 reply, send me a letter and we'll set a date for that.

25 MR. WEITZMAN: Thank your Honor.

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1 THE COURT: I have also received some applications
2 from the defendants about bail issues. However, I think one of
3 those came in this morning and the other came in late last
4 week. I want the government to put in a response on both
5 Mr. Amanat and Mr. Tuzman's applications to modify their bail
6 conditions.

7 How long will you need, Ms. Griswold?

8 MS. GRISWOLD: Your Honor, we would request two weeks
9 from tomorrow, December 6th. As your Honor said, motions are
10 from both defendants. There are also separate Pretrial Service
11 Officers we need to consult with. Given the holiday, we ask
12 for two weeks from tomorrow..

13 THE COURT: That would bring us to December 6th.

14 I am going to want the responses to conduct a full
15 analysis of the relevant factors under the Bail Reform Act,
16 including the strength of the case and all the other factors
17 that are listed in the Bail Reform Act and I will hold a
18 hearing after I receive the government's filing. In fact, we
19 can schedule that now. Mike, how do we look the week of the
20 6th? Later that week, say the 9th maybe?

21 MR. WEITZMAN: I apologize. I don't have my calendar,
22 but I can schedule around your Honor's schedule.

23 (Off-the-record discussion)

24 THE CLERK: The 10th, at 12:30, is available.

25 THE COURT: The 9th? The 10th is a Saturday, at least

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Conference

1 by my calendar.

2 (Off-the-record discussion)

3 THE CLERK: The 9th, at 3:00 o'clock, is available,
4 your Honor.

5 THE COURT: All right. I am going to schedule bail
6 review hearings for both defendants December 9th, at 3:00
7 o'clock. If that date and time proves problematic, let me
8 know.

9 MR. WEITZMAN: My client is a Sabbath observer, and
10 Sabbath starts very early now.

11 THE COURT: 12:30, is there a problem with 12:30?

12 THE CLERK: 12:30 is fine.

13 MR. WEITZMAN: Thank your Honor.

14 THE COURT: 12:30 on December 9th for bail review.
15 Are there other issues the lawyers want to raise?

16 MR. CREIZMAN: Your Honor, there are two outstanding
17 bail motions that are less extreme with respect to Mr. Amanat.
18 We are asking, obviously, for the hearing would be removal of
19 his home detention, electronic monitoring conditions. The
20 other one is the release of the funds, the cash to secure the
21 bond which has been replaced by the pledging of a house in
22 Verona, New Jersey. We provided proof to the court. All we
23 need is your Honor's, I don't know, an order or something for
24 his uncle to be able to get that money back.

25 THE COURT: I thought I had acted on that application.

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1 Maybe I am mistaken. Can the government shed any light on
2 that?

3 MS. GRISWOLD: We are not sure we saw an order. There
4 has been a lot of activity in the case.

5 THE COURT: Does the government object to Mr. Amanat's
6 proposition, which is essentially to substitute the property
7 for the cash?

8 MS. GRISWOLD: No, your Honor. We actually signed the
9 relevant paperwork on our end.

10 MR. CREIZMAN: Your Honor granted it, and I said then
11 I would provide proof of the filing then of the confession of
12 judgment in New Jersey, and then I don't know if there is
13 anything else required for Mr. Amanat's uncle to get the funds
14 back.

15 THE COURT: That I can't answer. What I can answer is
16 I thought -- and I guess from what you said, I am right -- that
17 I did act on it. I approved the application?

18 MR. CREIZMAN: Yes.

19 THE COURT: Are you telling me you think you need
20 something else from me with respect to the cash posted as bail?

21 MR. CREIZMAN: I do. That is why I filed a motion for
22 release of funds.

23 THE COURT: When did you file that?

24 MR. CREIZMAN: The date I filed that was November
25 16th. It is Docket No. 158.

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Conference

1 THE COURT: We'll look for that. I can't swear that
2 I've acted on that, but we'll look for it as soon as I go
3 upstairs.

4 MR. CREIZMAN: The second request is one made on
5 October 31st which was filed under seal concerning a request
6 for Mr. Amanat to be able to exercise twice a week or something in
7 accordance with Pretrial Services.

8 THE COURT: That I have not acted on, but I will
9 either before December 9th or at the December 9th hearing.

10 MR. CREIZMAN: Thank your Honor.

11 THE COURT: Anything else?

12 MR. WILLIAMS: Your Honor, just one point of
13 clarification. Before your Honor had told defense counsel that
14 they should submit a written response to the government's
15 jurisdictional question as to why Judge Nathan is not the
16 proper court to decide any potential civil discovery dispute as
17 to the forensic agreement between Mr. Maiden and the SEC, and
18 it seems to the government that is a threshold question that
19 needs to be resolved before we get to the joint investigation
20 question in this case. We just wanted to see what the deadline
21 was for that?

22 THE COURT: Actually, I don't know that that is true.
23 The Maiden thing is not subsumed totally within the joint
24 investigation issue. The Maiden issue is a privilege issue.

25 MR. WILLIAMS: In that regard, Mr. Maiden's counsel

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1 has already submitted a letter to the court saying that the
2 privilege has been waived with regard to any documents produced
3 to the FBI. So in this case there is no question at this point
4 with regard to the Maiden documents as to whether they are
5 privileged.

6 The issue is with documents that Mr. Maiden and the
7 SEC have withheld from civil discovery because of a privilege
8 dispute. That is governed by a forensic agreement entered into
9 in connection with the Judge Nathan case. Just in terms of
10 which court, this is a matter of procedure.

11 THE COURT: All right. Well, I do think I need a
12 response from defense to the government's letter of the 17th,
13 yes, it was of the 17th, arguing that at least as to the
14 privilege issue with respect to Maiden, as I said at the outset
15 of the hearing, the government argues that that issue should be
16 resolved by Judge Nathan and not by me, and I would like a
17 response to that. Is there any reason why defense counsel
18 can't get that in by Monday?

19 MR. WEITZMAN: I think that should be sufficient.

20 THE COURT: It is a discrete issue.

21 MR. WEITZMAN: Discrete and short response for the
22 reasons I have already articulated to the court.

23 THE COURT: We'll hear from the defense on Monday why
24 the issues regarding the Maiden privilege should not be
25 resolved by Judge Nathan.

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1 MR. WILLIAMS: Your Honor, perhaps in the same
2 response they can identify what remains in dispute with regard
3 to discovery that they are seeking from the government because,
4 of course, the joint versus parallel investigation issue only
5 comes before the court if there are documents that are in the
6 SEC's sole possession that the defense wants and the government
7 doesn't have those documents.

8 THE COURT: It is kind of a chicken or an egg thing.
9 One of the problems I am dealing with is we don't really know
10 what is in dispute.

11 MR. WILLIAMS: Neither do we, which is why we are
12 trying to focus the defense. Their motion, of course, was
13 related to entirely Mr. Maiden's documents. So the government
14 has now produced the FBI computers that we thought mooted the
15 question.

16 THE COURT: Well, it hasn't. We just heard it hasn't
17 mooted the question.

18 MR. WILLIAMS: Exactly, we don't know that.

19 THE COURT: It is sort of a chicken or an egg thing,
20 okay? Their point is the U.S. Attorney's Office does not have
21 all the documents the SEC has. They believe that it is
22 necessary at a minimum for the government to do a Brady-Giglio
23 search of whatever the SEC has. That is what they're asking
24 for. The threshold issue as to whether the U.S. Attorney's
25 Office has an obligation to approach the SEC about conducting a

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1 review of their documents is whether there was a joint
2 investigation or not.

3 MR. WILLIAMS: Your Honor, we agree with that.

4 The point we are making is in this case given the fact
5 that Mr. Amanat has not been sued by the SEC, the government
6 has already made the decision to obtain the SEC's documents,
7 make a production to Mr. Amanat, put the two defendants on
8 equal equal footing.

9 THE COURT: But what counsel has said, defense counsel
10 has said is whatever you get from the SEC presumably is what
11 they have produced in civil discovery to Tuzman, right? That
12 is what you're going to get.

13 The point they've made is that there is no reason to
14 believe that that is the entire universe of documents the SEC
15 has. That is their point.

16 MR. WILLIAMS: If that is their point, the proper way
17 to resolve it is for them to ask the government to consult with
18 the SEC, see whether there are additional documents that the
19 SEC has that they're withholding, and then ask the government
20 to obtain those documents and produce them. They have made
21 none of those requests. Instead it appears they want to run
22 through the gateway of the joint parallel investigation
23 question when there may not actually be a need.

24 The government's understanding is those questions
25 arise when the government says we are not going to ask the SEC

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1 and obtain from the SEC certain materials, and only then the
2 question whether the government has an obligation to do so
3 arises.

4 THE COURT: When we were last together in September, I
5 requested counsel to have discussions about how to resolve
6 these issues, and we find ourselves on November 21, and those
7 discussions it seems haven't really taken place. I am all for
8 avoiding motion practice, and it was my hope and my request
9 that the lawyers would talk through these issues themselves so
10 we wouldn't have to have papers filed.

11 MR. WILLIAMS: We think that is wise and we are
12 prepared to do that. I think the government's response by
13 indicating to the court we are willing to go and obtain the
14 SEC's production and produce it to Mr. Amanat is a strong
15 signal that we are trying to resolve issues without unnecessary
16 motion practice. There are plenty of things for us to be
17 consumed with in this case, but it appears they want a fight
18 where a fight might not be necessary.

19 So the government remains committed to have a dialogue
20 with counsel about how we can resolve certain questions, but we
21 did not get a call from either defense lawyer with an
22 indication that this was coming. No one consulted with us. No
23 one asked us whether we would oppose, and instead we find
24 ourselves here.

25 MR. WEITZMAN: I wasn't at the last court conference.

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1 The court conference occurred on September 22. In early
2 September the government found out there are two Maiden
3 computers that were never obtained by the U.S. Attorney's
4 Office and are in the possession of FBI. They didn't mention
5 that at the court conference, didn't call us to tell us those
6 two Maiden computers would be produced.

7 They knew full well we were going to file this motion.
8 We specifically raised the joint investigation prong of the
9 motion and the Maiden privilege prong of the motion. If
10 anybody could have avoided this motion practice, it would have
11 been a simple phone call or letter from the government saying,
12 hey, by the way, as to the issues you addressed at the court
13 conference, tell --

14 (Multiple voices)

15 THE COURT: Let's just cut through it. It is not
16 about blame or whose fault it is or whatever. It is about does
17 it make sense for there to be more discussions before more
18 papers are filed, that is the issue.

19 MR. WEITZMAN: I understand the government doesn't
20 want to file affidavits why there is or is not a joint
21 investigation. In my experience --

22 THE COURT: I think what they're saying is it is
23 wasteful to engage in motion practice if there is really not an
24 issue. What Mr. Williams just said is hey, we've already
25 offered to obtain from the SEC their entire production to

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1 Tuzman and turn it over to Amanat. We have shown good faith.
2 It may be that these issues that defense counsel was raising,
3 they go beyond that, could be resolved just by a simple
4 conversation. That is what they're saying.

5 I don't know whether they can be or they can't be, but
6 I don't think it is about whether they want to file an
7 affidavit whether it is a joint investigation or not. I don't
8 think that is any big deal. They filed such affidavits in the
9 Martoma case, and I ruled on the question.

10 Really the issue raised by what Mr. Williams said is
11 whether it makes sense for there to be more conversations
12 between the lawyers, say, over a week's time to figure out
13 whether there really is something in dispute here or not.

14 MR. WEITZMAN: I am happy as long as we keep the
15 deadlines and then if we can reach agreement that the issue is
16 moot as to the joint investigation, that is fine. For the
17 issue to be mooted, what we would need to know, for example,
18 would be that there isn't any document that wasn't produced to
19 the defense that concerns Maiden, Smythe, Tuzman, Amanat or any
20 of these schemes or any of the other witnesses.

21 Just to take it a step further, the SEC presumably has
22 notes from its own interviews from witnesses. We haven't
23 received any notes from interviews that the SEC conducted of
24 witnesses. The government argues it has an obligation to
25 review those notes and determine whether there is Brady or

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1 Giglio material or Rule 16 discovery in those notes. It is
2 inconceivable to me, in my experience, that the SEC has turned
3 over every single page because they never turn over their
4 notes. I think that is part of the government's obligation.

5 While the government would not like a finding of a
6 joint investigation, I think it is inevitable that issue is
7 going to have to be teed-up for your Honor for a ruling one way
8 or another.

9 MR. WILLIAMS: Your Honor, we don't need to belabor
10 the point. Again the government is showing good faith. We say
11 say to the SEC to our knowledge conducted two interviews on
12 their own in which they took notes, and the government
13 certainly is happy to take a look at those interview notes for
14 Brady and Giglio. It is not an issue, so that point on that
15 issue is moot.

16 If there are other points, the government is happy to
17 discuss. There is no harm in having dialogue and avoiding
18 waste of time. Everyone here is busy.

19 THE COURT: The lawyers will take a week. They will
20 take until next Monday to discuss these issues and figure out
21 whether there is an active dispute or not and we'll produce
22 from there.

23 MR. CREIZMAN: From our perspective, from Mr. Amanat's
24 perspective, I actually recognize today that our part of the
25 motion is mostly mooted except for certain items that we

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1 identified in our letter from Maiden's computers which I invite
2 the government to have a discussion with me about.

3 THE COURT: That will take place over the next week.
4 If you remain dissatisfied, you'll let me know and it will have
5 to be resolved.

6 MR. WEITZMAN: Does your Honor still want us to
7 address the jurisdictional issue?

8 THE COURT: I am holding it in abeyance because the
9 conversations I wanted to have happen sometime over the past
10 seven or eight weeks did not. It is my hope it will happen
11 over the next week and we can have a clear understanding what
12 is in dispute or not. I am holding that in abeyance, Mr.
13 Weitzman. Send me a joint letter or separate letters if you
14 can't agree on a joint letter as to what the remaining issues
15 are and what would be appropriate in terms of briefing of
16 whatever issues remain.

17 MR. WEITZMAN: Thank your Honor.

18 THE COURT: Anything else?

19 MR. WILLIAMS: Your Honor, has time been excluded
20 until trial in this case? I am sorry. I don't have my notes
21 from the prior conference.

22 THE COURT: I don't think I would have done an
23 exclusion through the trial date.

24 MR. WILLIAMS: If there is no exclusion, we move to
25 exclude time between today and the date of the bail hearing on

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1 December 6th, your Honor.

2 THE COURT: December 9th, actually.

3 MR. BEYS: No objection.

4 MR. CREIZMAN: No objection.

5 THE COURT: I will exclude time between today and
6 December 9th under the Speedy Trial Act pursuant to Title 18,
7 United States Code, Section 3161 (h)(7)(A) to permit defense
8 counsel to continue reviewing the discovery materials and
9 determine what pretrial motions will be filed. I do find that
10 the ends of justice served by the granting of this continuance
11 outweigh the best interests of the public and the defendants in
12 a speedy trial.

13 (Court adjourned)

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